

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) Case No. 33530
)
 DAVID ANTHONY COLE) **BOARD DECISION**
) (Precedential)
)
From dismissal from the position)
of Bookbinder I at the Office) **No. 94-27**
of State Printing, Department)
of General Services at Sacramento) September 7, 1994

Appearances: Harry J. Gibbons, Attorney, California State Employees' Association on behalf of appellant, David Anthony Cole and Deborah J. Kerns, Attorney, on behalf of respondent, Department of General Services.

Before Carpenter, President; Ward, Vice President; Stoner and Villalobos, Members.¹

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of David Anthony Cole (appellant or Cole). Appellant was dismissed from the position of Bookbinder I at the Office of State Printing, Department of General Services at Sacramento (Department) for refusing to be drug tested during a fitness for duty examination, for being absent without leave and for

¹Oral argument took place at the August 9, 1994 Board meeting before Board members Richard Carpenter, Lorrie Ward, Alice Stoner and Floss Bos. Prior to the Board rendering a decision in this case, Alfred Villalobos requested to participate in this decision. Board staff contacted the parties' representatives and asked whether they had any opposition to having Mr. Villalobos listen to a tape recording of the oral argument and participate in the decision. Both parties expressed approval of Mr. Villalobos' participation.

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failing to follow his supervisor's instruction that he return to work instead of retrieving and cashing his paycheck. The Department alleges that this conduct violates Government Code § 19572, subdivisions (d) inexcusable neglect of duty,

(e) insubordination, (j) inexcusable absence without leave, (m) discourteous treatment of others, (o) willful disobedience, and (t) other failure of good behavior.

The ALJ who heard the appeal found that appellant's refusal to be drug tested was not a cause for discipline because the examining physician had enough information to determine appellant's fitness without the drug test. The ALJ also found that appellant was not absent without leave. Appellant was found, however, to have disobeyed his supervisor's instruction on one occasion. The ALJ reduced the penalty of dismissal to a 90 day working suspension. The Board rejected the ALJ's Proposed Decision, deciding to hear the case itself to determine whether appellant was insubordinate when he refused to submit to a drug test during a fitness for duty medical examination.

After a review of the entire record, including the transcript and the written and oral arguments presented to the Board, the Board finds that an employee can be disciplined for refusing to cooperate in a fitness for duty exam but that, under the facts of this case, appellant was not insubordinate

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for failing to agree to a drug test. The Board finds that appellant was insubordinate for failing to follow his supervisor's order to return to work and for failing to follow clear procedures for calling in sick and for verifying illness. In addition, the Board agrees with the ALJ that the penalty should be reduced from a dismissal to a 90 working days' suspension for the reasons that follow.

FINDINGS OF FACT²

Employment History

Appellant has been employed by the Department since March of 1979. His present position is full-time Bookbinder I.

The appellant has received two prior adverse actions. The first was a three working days' suspension effective February 13, 1990 for being inexcusably absent without leave after appellant was absent from work for 7 hours on 9 occasions during June, September, and October 1989. The second was a 20 working days' suspension effective February 11, 1993 for inefficiency, neglect of duty, discourtesy, absence without leave, and insubordination for various instances when appellant was absent from work without notifying his supervisor as instructed. The February 11, 1993 adverse action also covered instances when appellant was discourteous to co-workers and supervisors.

²The findings of fact are taken for the most part from the ALJ's proposed decision.

Absences

Due to a significant number of absences, appellant was advised in writing on June 11, 1992 that all absences due to illness, medical, or dental appointments must be substantiated in writing by a physician on the day of the illness. Appellant was notified that, after an absence, he was to turn in the physician's note to his supervisor on the day he returned to work. Appellant was advised that any unexpected illness which prevented him from coming to work at the beginning of the shift must be reported to his supervisor or two other named employees prior to 7:00 a.m. These procedures were to be in effect for one year provided no disciplinary action occurred. The appellant was also referred to the Employee Assistance Program.

On March 22, 1993, appellant called in sick but did not directly notify his supervisor. Appellant testified that he often took messages for his supervisor from other employees who were calling in sick and saw no reason why reporting his absence to the employee who answered the phone would not suffice.

On March 23, 1993, appellant returned to work and presented a Visit Verification form from Kaiser Hospital. The form indicated that appellant was seen on March 23, 1993. The form contained the notation that "[Cole] states he couldn't get an [appointment] until today." The Department considers this an unacceptable medical verification because appellant did not visit

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the doctor the day he was ill. Appellant's attendance was recorded as seven hours unapproved dock for March 22, 1993.

On April 1, 1993, and again on April 7, 1993, after medical examinations related to appellant's worker's compensation claim, appellant complained of pain caused by the examinations. After getting his supervisor's authorization, appellant went home sick on both of these days. The Department seeks to discipline appellant for failing to provide doctor's verifications.

The Taxi Cab Ride

On April 20, 1993, appellant was scheduled for a fitness for duty medical examination. Appellant was told that the Department would pay for a cab to take him to his medical appointment and return him to his place of work at 1325 J Street, Sacramento. On the morning of April 20, 1993, appellant told Joan Bettati, Personnel Analyst, and Teresa Fagan, his supervisor at the Office of Insurance and Risk Management, that when the medical examination was finished, he wanted to take the cab to the State Printing Plant Office at 344 N. 7th Street, Sacramento, to pick up his pay check before he returned to work at 1325 J Street. Bettati told the appellant that the Department was not going to pay for the cab to drive him to the State Printing Plant. She told appellant to go directly to the doctor's office and, after the examination, to take the cab back to 1325 J Street and report

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to his supervisor. He was told he could then take his lunch and finish his regular work day at 3:30 p.m.

At approximately 1:49 p.m., appellant phoned Fagan to inform her that he was finishing up at the doctor's office and that he was going to take the cab to the Printing Plant Office and then go home. Ms. Fagan reminded appellant of the earlier discussion between Fagan, Bettati and appellant.

The appellant did not return to work as instructed. Appellant took the cab to the State Printing Plant on 7th Street, picked up his check and then continued the taxi ride back to the office on J Street. Appellant did not go into the office. Instead, he took a light rail train to his bank where he deposited his pay check. ³

The Medical Examination

On April 19, 1993, the day before appellant's medical examination, the Department corresponded with Dr. Will. The letter indicated to Dr. Will that the reason for the examination was to assess appellant's fitness for work, stating appellant had a

. . . known diabetic condition, which he inadequately manages. He implicates diabetes as his reason or excuse for extended breaks and lunches, tardiness, AWOL and extremely high absenteeism. Often he neither

³Appellant's taxicab ride cost \$17.80 which included both the authorized trip to the doctor's office and the unauthorized trip to the printing plant. The Department did not present evidence to break down this figure.

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reports to work nor calls in regarding his absences. Because of his AWOL and absenteeism, he is required to provide a doctor's verification for his absences. These are received only intermittently, many indicate verification after the absence, and the diagnosis often reads 'diabetes poorly controlled' or 'diabetes out of control.' Each illness lasts two to three days or more.

The letter also indicated that appellant demonstrated poor performance attitude and was insubordinate to his supervisor. In connection with appellant's history, the letter to Dr. Will noted that:

Mr. Cole has a history of drug addiction and was given time off approximately 2 years ago to go through a treatment program. Repeat substance abuse has been suspected for his current behavior problems, as well as his high absenteeism.

The doctor was instructed in this letter to evaluate the following:

Dr. Will, it is vital that Mr. Cole adequately manage his diabetic condition so that it does not impact his attendance, performance, or behavior at work. We are in need of your thorough evaluation of Mr. Cole's diabetic condition, your assessment of his current management techniques, and your recommendations for better management. Please describe in detail what routine procedures he must adhere to in order to maintain his health.

We are also in need of your evaluation for repeat substance abuse. Mr. Cole works around large moving machinery and it is imperative that he be under no undue influences, for his safety and that of his co-workers.

Appellant attended the fitness for duty examination as scheduled. Appellant was not notified prior to attending the examination that drug testing might take place.

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During the fitness for duty examination, Dr. Will determined that a drug screening test was indicated. At the hearing before the ALJ, Dr. Will testified that

[Cole] was cooperative in that he went along with the examination entirely up to the point where I told him that I believed he should be tested for drug usage and at that point, he refused to go along with that test. (RT:65:7-9).

In addition to Dr. Will's testimony, her medical report was also introduced into evidence. Dr. Will reported:

I explained to the patient that this was a Fitness for Duty examination and that if I found him unfit for duty, he would be removed from work until he was certified to be fit for duty by myself or another physician.

Dr. Will also reported that she explained to appellant that "I would be remiss in my duties as a physician if I did not perform the test to diagnose the disease [of cocaine addiction]." Appellant refused to take the test.

Despite appellant's refusal to take the drug test, Dr. Will made the following findings in her May 13, 1993 report:

1. Diabetes mellitus with completely irresponsible care to no care of his diabetes and extremely poor control.
2. History of cocaine abuse, last admitted one and one-half years ago; however, patient has symptoms and signs of continued drug abuse. Additionally, the patient has a history of alcohol abuse, according to the medical records I have thus far."

Based on her physical examination and the review of appellant's medical history, the doctor concluded that appellant

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was not medically fit for duty due to diabetes and drug abuse.

ISSUES

1. Can a physician conducting a fitness for duty examination under Government Code § 19253.5 order an employee to take a drug test?

2. Must a drug test ordered under § 19253.5 comply with the procedures set out in DPA Rule 599.960?

3. Is an employee who refuses to submit to a drug test insubordinate within the meaning of Government Code § 19572, subdivision (e), insubordination?

DISCUSSION

Drug Testing

Pursuant to Government Code § 19253.5, appellant was required to submit to a medical examination.⁴ During the course of appellant's examination, the physician determined that appellant was using drugs and that before being released to return to work, appellant needed to be drug tested. Appellant refused.

The purpose of a medical examination conducted pursuant to Government Code § 19253.5 is to "evaluate the capacity of the

⁴Government Code § 19253.5 provides in pertinent part:
[T]he appointing power may require an employee to submit to a medical examination by a physician or physicians designated by the appointing power to evaluate the capacity of the employee to perform the work of his or her position.

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employee to perform the work of his or her position." Section 19253.5 does not place any restriction on the medical examination.

Thus, the Board finds that if a physician determines that a particular test is required preliminary to preparing a complete report, the physician may order the test, be it an x-ray, blood test or drug test.

DPA Rule 599.960

As noted in Bruce Harrington (1991) SPB Dec. No. 93-18:

In October 1988, the Department of Personnel Administration (DPA) enacted a comprehensive set of regulations designed "to help ensure that the State workplace is free from the effects of drug and alcohol abuse." (2 Cal. Code of Regulations, section 599.960 et seq.) The regulations set forth in detail the procedures that State agencies are required to follow should they desire to utilize substance testing to attain the goal of a drugs and alcohol free workplace. They describe the circumstances under which an employee [in a sensitive position as further defined by the rule] may be tested, describe the standards to be observed in the collecting, handling, and testing of the sample, and set forth the procedures to be observed once substance abuse test results are received by the appointing power from the laboratory that has performed the tests. Id at p.2.

Appellant argues that the Department had no authority to seek a drug test from appellant during the medical examination because, in requesting the drug testing, the Department failed to follow the strict procedural requirements of DPA Rule 599.960 et seq.⁵ Appellant is correct that in Harrington, the Board found

⁵All section references are to Title 2 of the California Code of Regulations unless otherwise indicated.

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that a Department could not force an employee to submit to a drug test under Rule 599.960 unless the strict procedural safeguards established in the rule were followed.

Just because drug testing is ordered, however, does not mean that DPA Rule 599.960 is implicated. Rule 599.960 provides the following statement of general policy:

(a) It is the purpose of this article to help ensure that the State workplace is free from the effects of drug and alcohol abuse. These provisions shall be in addition to and shall not be construed as a required prerequisite to or as replacing, limiting or setting standards for any other types of provisions available under law to serve this purpose, including employee assistance, adverse action and medical examination. (emphasis added).⁶

Thus, the adoption of DPA Rule 599.960 did not preclude other, more traditional avenues that continue to be open to the Department.⁷

⁶Drug testing may also be authorized through settlement agreements. See e.g. Karen Nadine Sauls (1992) SPB Dec. 92-13 (reinstatement predicated on appellant's agreement to drug testing).

⁷The Department presented testimony that the drug testing procedures set out in DPA 599.960 et seq were superseded by a collective bargaining agreement that, in essence, tracked the DPA rules. The Department acknowledges that, at the time appellant was examined, the Department had not yet completed the supervisory training processes required before testing could be implemented under the Memorandum of Understanding (MOU).

Just as DPA 599.960 supplements other statutory provisions, so too does the MOU supplement and not replace or supersede Government Code § 19253.5. Government Code §3517.6 lists all the Government Code sections which can be superseded by an MOU if there is a conflict between the code and the MOU. Section 19253.5 is not included on the list.

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An appointing power is not required to pursue any particular course when more than one option for dealing with an employment issue applies. See Department of General Services v. State Personnel Board (1994) 22 Cal. App. 4th 1627, 1640 (board may not second guess appointing power's decision to reject employee on probation after reinstatement from medical termination rather than seek a second medical termination). Consequently, we conclude that during the course of a fitness for duty examination conducted pursuant to Government Code § 19253.5, an employee may be subject to drug testing upon the order of the examining physician who determines that drug testing is appropriate.

Insubordination

Generally, a finding of insubordination is appropriate when an employee fails to submit to authority by ignoring or disobeying a direct order the supervisor is entitled to give and entitled to have obeyed. (See Parrish v. Civil Service Commission (1967) 66 Cal. 2d 260, 264). As discussed above, an employee may be ordered to submit to a medical examination pursuant to Government Code § 19283.5 and the examining physician may properly order that a drug test be administered as part of that medical examination. Thus, under most circumstances, a doctor's order that an employee be drug tested is an order the doctor is entitled to give and entitled to have obeyed. Alternatively, a Department may issue such an order to an

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employee after a physician has made a determination that testing is necessary to determine the employee's fitness for duty.⁸

To find insubordination, however, the fact finder must also find that the failure to comply with the direct order was intentional and willful conduct. (Coomes v. State Personnel Board (1963) 215 Cal. App. 2d 770, 775.) As the court noted in Coomes, "the [elements of intent or willfulness] imply that the person knows what he is doing and intends to do what he is doing."

Here, the examining physician merely explained to appellant that she "believed he should be drug tested" and that she "would be remiss in [her] duties if [she] did not perform the test." We do not find these statement alone to be sufficiently recognizable as a direct order entitled to obedience.

On these facts, appellant cannot be said to have intentionally or willfully disobeyed a direct order. In addition, the Doctor explained that the consequence of appellant's action in refusing to be tested would be that he would not be found fit for duty, not that he would be disciplined. While an employee does not have the right to have

⁸In many instances, it would be helpful for an employee to be apprised in advance of his duty to submit to whatever testing the physician determines appropriate. A written notice to that effect would serve to clarify the employee's duty for physicians and employees alike.

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every consequence of his actions spelled out as a prior condition of discipline, here appellant was erroneously informed of the consequence of his refusal. [See Richard Vasquez Ramirez (1994) SPB. Dec. 94-05 (notice to appellant that the result of his failure to provide documentation would result in pay being withheld precludes finding of inexcusable absence without leave or inexcusable neglect of duties)].

The charge of insubordination is dismissed. The same elements of intent and willfulness occur in willful disobedience as in insubordination. Thus, for the reasons stated above, appellant also cannot be said to have been willfully disobedient.

The Absences

Appellant was absent from work on March 22, 1993. This absence is charged as a cause for discipline on two grounds. First, appellant did not visit the doctor on the day he was ill, but, instead, visited the clinic the following day on his way to work. Second, appellant was ordered to speak directly to his supervisor or two other named employees if he called in sick but, instead of following this instruction, appellant left the message with another employee.

Appellant was under strict attendance restrictions which required that he visit the doctor the day of his illness. Appellant did not comply with the Department's clear order. In addition, appellant disregarded his supervisor's order to report

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illness to either her or two other named individuals. Appellant did not comply. Appellant's behavior constitutes insubordination.

As for appellant's absences on April 1 and 7, 1993, the reason appellant was placed on restrictions was the need to substantiate his illnesses so that the Department could take appropriate action.

On these dates, appellant's supervisor directly authorized appellant to leave work early. Appellant's belief that additional documentation was not required is reasonable under the circumstances. These charges are dismissed.

The Taxi Cab Ride

When appellant left Dr. Will's office on April 20, 1993, he called his supervisor to discuss going to the printing plant before going to the office. Despite her instructions to the contrary, appellant went to the printing plant and then to the office, arriving shortly before 3 p.m. Appellant then took a light rail train home.

Appellant's conduct of failing to return to work as ordered constitutes cause for discipline under Government Code § 19572, subdivisions, (j) inexcusable absence without leave, (o) willful disobedience, and (t) other failure of good behavior.

PENALTY

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the

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Board is charged with rendering a decision which, in its judgment is "just and proper." Government Code § 19582. In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion. (See Wyllie v. State Personnel Board (1949) 93 Cal.App.2d 838.) The Board's discretion, however, is not unlimited. In Skelly v. State Personnel Board (1975) 15 Cal.3d 194, the California Supreme Court noted:

While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion which is, in the circumstances, judicial discretion. (Citations) 15 Cal.3d at 217-218.

In exercising its judicial discretion in such a way as to render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id.)

Appellant has received two prior adverse actions where his attendance and failure to follow instructions constituted cause for discipline. In this instance, appellant has again failed to

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follow instructions. In addition, appellant failed to follow his supervisor's stated procedure for calling in sick.

Appellant's misconduct is recurring. Adverse action does not seem to educate appellant as to his responsibilities at the workplace. The main charge against appellant, willful failure to take a drug test as ordered, has not been proven, however. Thus, we agree with the ALJ that dismissal is excessive and reduce the penalty to a 90 working days' suspension.

CONCLUSION

Appellant's conduct in failing to follow stated procedures for calling in sick and for ignoring his supervisor's instruction to return to work after a medical examination constituted insubordination, inexcusable absence without leave, willful disobedience and other failure of good behavior. Under these facts, however, appellant was not insubordinate or willfully disobedient when he refused to take a drug test during a fitness for duty examination. The penalty of dismissal is modified to 90 days' suspension.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The above-referenced action of the Department General Services in dismissing appellant is modified to a ninety (90) days' suspension;

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2. The Office of State Printing, Department of General Services shall reinstate David Anthony Cole to the position of Bookbinder I and pay to him all back pay and benefits that would have accrued to him had he been suspended for ninety days rather than dismissed.

3. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

4. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Lorrie Ward, Vice President
Alice Stoner, Member
Alfred R. Villalobos, Member

*Member Floss Bos was not present when this decision was adopted and did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Resolution and Order at its meeting on September 7, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board